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No. 94-1604

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

FUN 'N SUN RV, INC. ET AL.,
*Petitioners,*

v.

STATE OF MICHIGAN, ACCIDENT FUND DIRECTOR,
ACCIDENT FUND OF MICHIGAN,
AND STATE ADMINISTRATIVE BOARD,
*Respondents.*

**On Petition For A Writ Of Certiorari**
**To The Michigan Supreme Court**

## RESPONDENTS' BRIEF IN OPPOSITION

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April 1995

## QUESTIONS PRESENTED

1. Whether state legislation authorizing the sale of the Accident Fund of Michigan, a state agency providing workers' compensation insurance, violates the constitutional prohibition against impairment of contracts, where the state legislation provides for an intact sale of the Accident Fund's assets and liabilities, including all obligations under existing insurance policies.

2. Whether holders of nonassessable workers' compensation insurance policies issued by the Accident Fund of Michigan have a vested right to the proceeds of the state's intact sale of the Accident Fund's assets and liabilities, so that state legislation providing that the proceeds of the sale belong to the state violates the constitutional prohibition against the taking of private property without just compensation.

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1994

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Fun 'N Sun RV, Inc. et al., *Petitioners,*

v.

State of Michigan, Accident Fund Director,
Accident Fund of Michigan, and State Administrative Board,
*Respondents.*

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On Petition For A Writ Of Certiorari
To The Michigan Supreme Court

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# RESPONDENTS' BRIEF IN OPPOSITION

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## OPINION BELOW

The opinion of the Michigan Supreme Court (Pet. App. at A-14 to A-50) is reported at 447 Mich. 765, 527 N.W.2d 468 (1994).

## JURISDICTION

The opinion of the Michigan Supreme Court was filed on December 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Although the Michigan Supreme Court has not yet entered final judgment on petitioners' claims, respondents share petitioners' belief that this Court has jurisdiction to consider the petition under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975). The Michigan Supreme Court's opinion was issued in response to a certified question from the Michigan Court of Claims, which certification had been requested by Executive Message of the Governor pursuant to Michigan Court Rule 7.305. Respondents have moved for entry of judgment in the Court of Claims based on the Michigan Supreme Court's opinion, and

petitioners have conceded that judgment in accordance with the opinion is appropriate.

## STATUTORY PROVISIONS INVOLVED

The legislation authorizing the State of Michigan's sale of the Accident Fund states:

> Sec. 701a. (1) The state administrative board... may authorize the executive director of the state accident fund to enter into and consummate, under terms and conditions approved by the state administrative board, an agreement in the name of the state of Michigan for the sale of all or substantially all of the assets of the state accident fund to a permitted transferee, and assumption of all or substantially all of the liabilities of the state accident fund by the permitted transferee....
>
> (2) The consideration in the transaction referred to in subsection (1) shall be the property of the state of Michigan.

1993 Mich. Pub. Acts 198, § 701a (Mich. Comp. Laws § 418.701a (West. Supp. 1994)).

The legislation governing the requirements which must be met by any purchaser of the Accident Fund states:

> Sec. 5106. On and after the effective date of the transfer, any acquiring insurer shall be subject to the following:
>
> > (a) The acquiring insurer shall assume, indemnify, and hold the state of Michigan and any of its subdivisions harmless from and against all existing liabilities of the state accident fund under policies of workers' compensation and employers' liability insurance issued by the state accident fund before the effective date of the transfer....

1993 Mich. Pub. Acts 200, § 5106(a) (Mich. Comp. Laws § 500.5106(a) (West Supp. 1994).

## STATEMENT OF THE CASE

### I. The Accident Fund Of Michigan.

The Accident Fund Of Michigan was created by the Michigan Legislature as part of the first Worker's Disability Compensation Act, 1912 Mich. Pub. Acts (1st Ex. Sess.) 10, Part V, to provide worker's compensation and employer's liability insurance. The Legislature directed that the Fund be "neither more nor less than self-supporting." In 1917, the Worker's Disability Compensation Act was amended to create an advisory board which was to advise the Insurance Commissioner on administration of the Fund. In 1969, the legislation creating the Fund was repealed and new enabling legislation was passed (Mich. Comp. Laws § 418.701 *et seq.* (1979)), but the basic framework of the Fund remained, including the mandate that it be neither more nor less than self-supporting.

Over the last 15 years, disputes have arisen over whether the State of Michigan, through the Insurance Commissioner, or the advisory board controlled the Fund. In 1981, a federal lawsuit was filed by the Fund against the Commissioner to prevent the Commissioner from designating employees of the Fund as civil servants. *Accident Fund v. Baerwaldt,* No. G81-224 (W.D. Mich.). In this context, on January 9, 1984, the parties to that case entered into a Consent Judgment which declared, in part, that under then-existing law, the State could not borrow or take the assets, monies and funds held for or by the Accident Fund, and that the State had no known, ripe or outstanding claims to or interest, other than as trustee, in the assets, monies and funds held for or by the Fund. Pet. App. at A-74 to A-77.

On February 2, 1984, the federal court in *Baerwaldt* issued an opinion holding that resolution of the issue before it turned on whether the Accident Fund was a state agency, a matter of first impression which depended on interpretation of Michigan statutes, legislative history, attorney general opinions, and any analogous case law. The court, therefore, abstained from deciding the case and dismissed all but certain ERISA claims. *Accident Fund*

*v. Baerwaldt,* 579 F. Supp. 729 (W.D. Mich. 1984). The case was ultimately dismissed in its entirety, with prejudice, in 1990.

In 1988, in another case over control of the Fund, *Insurance Comm'r v. Advisory Bd.,* 173 Mich. App. 566, 434 N.W.2d 433 (1988), *appeal denied,* 433 Mich. 872 (1989), the Michigan Court of Appeals held that the Accident Fund was a State agency and *not* a mutual insurance company. Specifically relying on Mich. Comp. Laws § 418.711, which contained the "neither more nor less than self-supporting" restriction, the Court of Appeals ruled that the State was not permitted to receive any "profits" which the Fund might generate, and that it "holds the assets of the Accident Fund in trust," to be expended only "to further the purpose of the Accident Fund." 173 Mich. App. at 588, 434 N.W.2d at 443.

Effective June 29, 1990, Michigan Pub. Act 157 repealed Mich. Comp. Laws § 418.711's restriction that the Fund be neither more nor less than self-supporting. At the same time, control of the Accident Fund was transferred from the Insurance Commissioner to an Executive Director appointed by the Governor. Mich. Comp. Laws § 418.701(2) (West Supp. 1994).

Effective April 1, 1994, the Michigan Legislature authorized the State to proceed with an intact sale of the assets and liabilities of the Accident Fund and provided that the proceeds of the sale shall be the property of the State. Mich. Comp. Laws § 418.701a (West Supp. 1994) (the "Sale Legislation"). The State was to withdraw no money from the Fund; the Fund was not to be dissolved or liquidated; and none of its assets were appropriated or diverted in any way to the State.[1]

Under applicable statutes, holders of insurance policies issued by the Accident Fund have no right to force the declaration of dividends or other distributions of assets. Conversely, while the

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[1] Petitioners assert as fact that the Sale Legislation was the result of a "plan" by the State Legislature "to eliminate the [petitioners'] rights to the Accident Fund's assets." Pet. at 6. Whether any such "rights" exist was the very issue before the Michigan Supreme Court. In any event, there is no evidence in the record of any such "plan."

law allows the Executive Director to make assessments on policyholders for additional premiums should existing premiums fail to cover claims, Mich. Comp. Laws § 418.715 (West Supp. 1994), the insurance policy contracts issued by the Fund to the petitioners expressly provide that they are nonassessable. Pet. App. at A-67. The policies provide only that in return for premiums, policyholders will receive worker's compensation and employer's liability insurance under applicable state law and any dividends which may be declared. *Id.* Declaration of dividends is discretionary with the Executive Director. Mich. Comp. Laws § 418.715.

The Sale Legislation was to expire on December 31, 1994 if no sale transaction had been completed by that date. The sale closed on December 28, 1994.

**II. Procedural History.**

The original complaint in this case was filed on September 21, 1993 in the Michigan Court of Claims. Petitioners made no constitutional claims at that time, alleging only that a failure to distribute funds to certain policyholders upon a sale of the Fund would be contrary to state law.

On November 1, 1993, respondents filed a motion to dismiss on the ground that petitioners had failed to state a claim upon which relief could be granted. On March 9, 1994, the Court of Claims issued an Opinion And Order denying respondents' motion, declaring that "the assets" of the Accident Fund are held "in trust for the benefit of the policyholders," relying on *Advisory Board, supra*, 173 Mich. App. at 588, 434 N.W.2d at 443. Pet. App. at A-5.

On the same day that the Sale Legislation took effect (April 1, 1994), petitioners filed their First Amended Class Action Complaint, raising for the first time claims under the Michigan and United States Constitutions.

On May 6, 1994, pursuant to Michigan Court Rule 7.305, Governor John Engler submitted an Executive Message to the Michigan Supreme Court, asking that the court consider the constitutionality of the Sale Legislation. Pet. App. at A-100 to

A-102. After requesting and considering briefs submitted by the parties, the court issued an order directing the Court of Claims to certify the question. Argument before the Michigan Supreme Court occurred on November 1, 1994.

The Michigan Supreme Court issued its opinion on December 30, 1994. In a 4-2 decision with one abstention, the court held that petitioners had not established vested property rights in the assets of the Accident Fund and that no contract rights would be impaired by the sale. Pet. App. at A-14 to A-50.[2]

## REASONS FOR DENYING THE PETITION

### I. The Law Governing Petitioners' Claims of Unconstitutional Takings And Impairment Of Contracts Is Not Unsettled, And, In Any Event, Petitioners Fail To State Such Claims.

Most of the petition in this case is devoted to arguing the merits of the decision below. At Pet. pages 28-29, however, petitioners finally explain why they believe certiorari should be granted: they contend that the Michigan legislation authorizing an intact sale of the Accident Fund's assets and liabilities is an indirect way of accomplishing that which (they claim) would be unconstitutional if accomplished directly, *i.e.*, confiscation of the Accident Fund's assets. Petitioners assert that the Court should grant certiorari because "federal constitutional law should clearly preclude takings by indirection" and, according to them, the law does not currently do so. Pet. at 28-29. Petitioners' argument should be rejected because (i) it overlooks an entire body of Supreme Court precedent which demonstrates that this case presents neither novel nor unsettled questions, and (ii) it assumes that an unconstitutional taking in fact has occurred, when

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[2] The affidavit submitted at Pet. App. pages A-96 to A-97 was created after the Michigan Supreme Court issued its opinion below and thus was not before that court at the time of its decision. It should not be considered in reviewing the petition.

petitioners have not established that they have vested property rights under state law.

First, it is incorrect that this Court has not indicated that indirect takings are unconstitutional. For example, "the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without . . . formal proceedings." *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 316 (1987) (" '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,' " *quoting Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922)). Thus, inverse condemnation, where the government takes property by means other than a formal exercise of eminent domain, is a recognized example of indirect taking, and the Court need not take this case to reaffirm that such species of takings are constitutionally proscribed.[3]

Moreover, regardless whether this Court has spoken on "takings by indirection," the Michigan Supreme Court opinion which is the subject of the present petition *in no way turned on any purported distinction between direct and indirect takings.* The issue before the court was more basic than that; it was whether petitioners had met the requirement of establishing legitimate

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[3] *See also Morgan Guaranty Trust Co. v. Republic of Palau,* 680 F. Supp. 99, 105 (S.D.N.Y. 1988) ("Congress may not use its power to control jurisdiction as an *indirect means* to impair rights" (emphasis added) (citing *Graham v. Goodcell,* 282 U.S. 409, 431 (1931)). In *Graham,* the Court found that no vested rights were put at issue by the passage of certain new tax legislation. 282 U.S. at 426-30. The Court noted that, had vested rights been established, a provision of the legislation withdrawing the government's consent to be sued would not have avoided a takings claim:

> If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong.

*Id.* at 431. In other words, the government could not have effected a violation of vested rights indirectly by denying the remedy to enforce such rights.

contract or property rights in the first place. As stated by the Michigan Supreme Court:

> The arguments of [petitioners] can be grouped under two constitutional headings: impairment of an obligation of contract, and deprivation of property without compensation. While these are separate theories, each requires that plaintiffs demonstrate ownership of specific contract rights or property rights. Without such a demonstration, there can be no impairment or deprivation. We hold that plaintiffs have no such contract or property rights.

Pet. App. at A-23.

To arrive at this holding, the Michigan Supreme Court applied settled constitutional law principles to adjudicate petitioners' claims to vested property rights under state law (*i.e.*, under various provisions of Michigan's worker's disability compensation statutes, Mich. Comp. Laws § 418.711a, 712, 746, and 751 [Pet. App. at A-23]; prior Michigan case law construing those provisions; and the terms of the Accident Fund's insurance contracts). It then concluded, "[w]e find nothing, explicit or implicit, in the policy contract or the governing statutes that gives rise to the vested property interest asserted by [petitioners]." Pet. App. at A-45.[4] In such circumstances, *i.e.*, where rights are alleged to exist based on specific contract language and bits and pieces of state statutes, and the state's highest court has ruled that no rights are violated, review by this Court through a writ of certiorari is not warranted.[5]

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[4] Petitioners' assertion that the Michigan Supreme Court made a "finding that the Michigan State Legislature had a right to statutorily abrogate [petitioners'] proprietary interest in the Accident Fund" (Pet. at 29) is thus a mischaracterization of that court's opinion.

[5] *See Methodist Hosp. v. State Ins. Fund*, 64 N.Y.2d 365, 476 N.E.2d 304, *appeal dismissed*, 474 U.S. 801 (1985) (mem.), raising issues similar to those in the present case. There, legislation transferring $190 million from New York's State Insurance Fund, a state-run workers' compensation insurer, to the state's General Fund was challenged by insured employers asserting, *inter alia*, claims of impairment of contract and taking without just compensation. 476 N.E.2d

## II. The Michigan Supreme Court's Decision Does Not Conflict With Prior Decisions Of This Court.

Petitioners also assert that the Michigan Supreme Court's decision conflicts with prior decisions of this Court. They cite only two cases: *Lynch v. United States*, 292 U.S. 571 (1934), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). Pet. at 23-28, 29. Neither is inconsistent with the present case and both are readily distinguishable.

First, neither *Lynch* nor *Webb's* is factually similar to this case. Neither involved state legislation authorizing the sale of an insurance entity. Neither involved construction of any state's workers' compensation laws or contracts issued pursuant to such laws.

While *Lynch* does involve insurance contracts to which one party is the government (albeit the federal, not state, government), any similarity to the present case ends there. The *Lynch* decision struck down legislation repealing the War Risk Insurance Act, which repeal would have had the effect of "abrogat[ing] outstanding contracts" of the United States, "reliev[ing] the United States from all liability on the contracts without making compensation to the beneficiaries." 292 U.S. at 579.

In contrast, the Michigan legislation expressly requires the buyer to assume the Fund's liabilities, including those under existing insurance policy contracts (Mich. Comp. Laws § 500.5106(a) (West Supp. 1994)) and, under the sale, all reserves and surplus of the Fund were transferred to the buyer to cover such liabilities. Petitioners do not dispute that they will receive the insurance coverage they bargained for, notwithstanding Michigan's sale of the Accident Fund.[6] Because petitioners'

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at 307. The New York Court of Appeals upheld the statutes, and this Court dismissed the employers' appeal "for want of a substantial federal question."

[6] In fact, as the Michigan Supreme Court noted in dictum, "there is reason to believe that worker protection would be enhanced" by the sale of the Accident Fund (Pet. App. at A-44), for the following reason: Mich. Comp. Laws § 418.700(b) (West Supp. 1994) requires that any purchaser of the Fund must be an insurer organized under Chapter 51 of the Michigan Insurance Code;

contracts will be honored, not abrogated, by the legislation authorizing and governing the sale of the Fund, *Lynch* affords no basis for review in this Court.

Nor does the Michigan Supreme Court's decision conflict with *Lynch* because of any impairment of contract rights allegedly created by the statutory provisions cited by petitioners (Pet. at 16-19):

> (a) Section 711(a) of the Worker's Disability Compensation Act (Mich. Comp. Laws § 418.711(a)) provides that "premiums ... shall be at the lowest level possible, consistent with sound insurance actuarial standards," as petitioners state. Petitioners fail to explain what contract right they claim is conferred by this provision, however, or how the sale of the Fund violates the provision or the right.[7]
>
> (b) Neither the Accident Fund policies nor the provisions of Mich. Comp. Laws § 418.746 (West Supp. 1994), relating to the Accident Fund's "revolving fund," gives rise to vested rights to any dividends. The policies provide for distribution only of "any dividends declared" (*see* Pet. App. at A-67), and the statute merely lists dividends as one use of revolving funds. But whether to declare dividends is wholly discretionary. Mich. Comp. Laws § 418.715. As the

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such an insurer is required to be a member of the Michigan Property and Casualty Guaranty Association, which exists to cover claims of insolvent members. Mich. Comp. Laws § 500.7901 *et seq.* (1979). The Accident Fund was *not* required to be a member of the Guaranty Association, and thus, before the sale, its insureds had no protection in the event the Fund became insolvent. *See* Pet. App. at A-44, n. 36.

[7] Any takings claim based on an allegation that the Accident Fund's premiums were not "at the lowest level possible" would be unripe because administrative remedies for such a claim are available in the Michigan Insurance Code (*see* Mich. Comp. Laws §§ 500.2418 and 500.2419, which permit policyholders to challenge rates and premium charges) and petitioners have not availed themselves of these remedies. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) ("if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation").

Michigan Supreme Court correctly put it, "Because § 746 makes no promise that dividends will ever be paid, it does not create a vested right." Pet. App. at A-38.

(c) No rights under Mich. Comp. Laws § 418.751 (1979) are violated by the sale because that provision relates to disposition of Accident Fund assets upon dissolution of the Fund, and no dissolution has occurred. Pet. App. at A-34. Moreover, even if dissolution of the Fund were taking place, § 751 "makes no mention of distribution to, or preference of, the policyholders regarding the disposition of fund assets." Pet. App. at A-34.

The other case cited by petitioners, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), also presents no conflict. In that case, the Court struck down as an unconstitutional taking a Florida law which deemed interest earned on monies deposited in interpleader accounts held by the clerk of the county circuit court to be income of the clerk's office, where (1) the county concededly could make no claim to the deposits themselves, which would "[e]ventually, and inevitably" (449 U.S. at 161) be distributed back to the depositors; and (2) the county already charged a separate fee for management of the account. The Florida Supreme Court had upheld the statute on the ground that the deposits should be "'considered public money.'" *Id.* at 158. This Court's holding was expressly limited to "the narrow circumstances" of that case, however: "where there is a separate and distinct state statute authorizing a clerk's fee 'for services rendered' based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others. . . ." *Id.* at 164. No such circumstances are present here.

In summary, the Michigan Supreme Court's opinion applied basic constitutional tenets to issues governed by Michigan law. The result does not conflict with prior decisions of this Court.

## III. The Michigan Supreme Court's Decision Does Not Conflict With Decisions Of Other States' Highest Courts.

Petitioners' assertion that the Michigan Supreme Court's opinion conflicts with decisions of other states' courts of last resort (Pet. at 11-13) is incorrect. First, each of the state court decisions cited by petitioners (*id.* at 12 & nn. 25-26) turns on a detailed analysis of particular state insurance statutes, none of which compares closely with the Michigan statutes at issue here. *See* Pet. App. at A-44 n. 37, comparing cases. Moreover, it is undisputed that "[n]one of the cases cited by plaintiffs as authority for policyholder ownership of fund assets involved the sale of a business with the buyer purchasing all assets and assuming all liabilities." *Id.* at A-44.

The only similarity among the cases is this: each involved the proposition that, under applicable state law, monies held by state insurance funds are in some sense held "in trust." To that extent, the Michigan Supreme Court's opinion is in accordance with the other states' decisions. Pet. App. at A-38 to A-40. But the nature of the trust in this context is a matter of state law. The Michigan Supreme Court correctly concluded, in interpreting a prior decision of the Michigan Court of Appeals (*Insurance Comm'r v. Advisory Board, supra,* 173 Mich. App. 566 (1988)), that, under Michigan law, Accident Fund policyholders' premiums are held "in trust," not in the sense of a "formal trust relationship" (Pet. App. at A-39), but rather "in the sense that the state's receipt of the policyholders' premiums resulted in an obligation to manage those premiums to assure the intended benefit, insurance coverage." *Id.* at A-40.[8] Here, the Sale Legislation ensures that this obligation will be met.

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[8] Petitioners assert that, in reaching this conclusion, the Michigan Supreme Court erred in interpreting Michigan law, by not following the consent judgment entered in *Baerwaldt, supra,* the prior federal case (to which petitioners were not parties) which ultimately was dismissed on abstention grounds. Pet. at 15-16 & n. 36. Such a claim — even if it were true — hardly would justify review by certiorari in this Court. But it is false, regardless, because *Baerwaldt* was not binding on the Michigan courts in this case. Absent a showing that the

This Court should not review this case for the inappropriate purpose of comparing the Michigan Supreme Court's interpretation of Michigan statutes on this point with the interpretations other state courts have made of their states' laws.

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parties had a contrary intent, a consent judgment does not have collateral estoppel effect. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955); *United States v. International Bldg. Co.*, 345 U.S. 502, 505-06 (1953); *American Mut. Liab. Ins. Co. v. Michigan Mut. Liab. Co.*, 64 Mich. App. 315, 327, 235 N.W.2d 769, 776 (1975). *See also* 18 Wright, Miller & Cooper, Federal Practice & Procedure, § 4443 (1981) at pp. 383-85 ("Whatever form is taken [by a settlement, whether it be by stipulation or consent judgment], the central characteristic is that the court has not actually resolved the substance of the issues presented. . . . In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented." The result is the same, "[h]owever close the [judicial] examination may be," because "the fact remains that it does not involve contest or decision on the merits").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 94-1604

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# Supreme Court of the United States

October Term, 1994

FUN 'N SUN RV, INC., et al.,

*Petitioners,*

v.

STATE OF MICHIGAN AND
ACCIDENT FUND DIRECTOR,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The 30th Judicial Circuit/Court Of Claims,**
**Ingham County, Michigan**

## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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## STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

The Petitioners ("Policyholders") incorporate by reference the Statement of Questions Presented for Review as contained in their Petition for Writ of Certiorari.

## JURISDICTION

The parties agree that this Court has jurisdiction to consider the Petition under *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 479-80 (1975), and 28 U.S.C. §1257(a). It should be noted that prior to the 1988 amendment to 28 U.S.C. §1257(c), this case would have been reviewable as a matter of right.

## STATUTORY PROVISIONS INVOLVED

The State of Michigan has never put any of its money into the Accident Fund, nor have its funds been at risk in operating the Fund:

> Sec. 701.(1) . . . The State shall not be liable or responsible for the payment of claims for compensation under the provisions of this Act beyond the extent of the sums so collected and received.

1969 Mich. Pub. Acts 317, §701, being Mich. Comp. Laws §418.701.

Prior to the effective date of the transfer of the Accident Fund, which triggered its repeal under 1993 Mich. Pub. Acts 98, §2, the Accident Fund's enabling legislation required Accident Fund revenues to be deposited in a revolving fund to be used exclusively for the benefit of the policyholders:

> Sec. 746.(1) The Executive Director shall maintain a revolving fund derived from premiums collected from members of the fund. The revolving fund shall be used exclusively for the following purposes:
>
> (a) Payment, handling and servicing of claims.
>
> (b) Payment of fees imposed by this Act or as otherwise provided by law.
>
> (c) Insurance expenses, including agent's commissions.

(d) The operating budget of the fund.
(e) Investments.
(f) Transactions with the Michigan Worker's Compensation Placement facility.
(g) Reinsurance.
(h) Refunds of premiums or applicant's funds.
(i) Dividends and similar payments to policyholders.

1990 Mich. Pub. Acts 157, §1; Mich. Comp. Laws §418.746 (West Supp. 1994).

Section 746 was repealed effective on the date the Accident Fund was sold, which was December 28, 1994:

> Sec.701.(3). Except as otherwise provided in this Chapter, after the effective date of the transfer, the State Accident Fund shall not transact insurance in this State, and all operations of the State Accident Fund, pursuant to former sections, 705, 711a, 712, 714, 715, 722, 723, 725, 735, 742, 745, 746, 755, and 756 shall cease . . .

1993 Mich. Pub. Acts 198, §1; Mich. Comp. Laws §418.701(3).

## STATEMENT OF FACTS

In reciting case history, Michigan omits an important feature of the previous suit between the Policyholders and the State of Michigan, the *Baerwaldt* case,[1] and distorts the premise of the Michigan Court of Appeals' Decision in *Insurance Commissioner*.[2] Both efforts are designed to unfairly discredit Michigan precedent preceding the inconsistent December 30, 1994 Decision, which is up for review.

In truth, in 1982, two years before the Consent Decree was executed, the Federal Court for the Western District of Michigan issued summary disposition in *Baerwaldt* establishing that the Accident Fund was a Trust, that the Policyholders

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[1] *Accident Fund v. Baerwaldt*, 579 F. Supp. 729 (W.D. Mich. 1984).

[2] *Insurance Commissioner v. Advisory Board*, 173 Mich. App. 566, 434 N.W.2d 433 (1988), *app. den.*, 433 Mich. 872 (1989).

were its beneficiaries, that its assets were not available for the general state purposes, and that they were *not* subject to appropriation by the Legislature:

> The assets of the Accident Fund are held in Trust by the Treasurer of the State of Michigan for the benefit of the employer insureds. Consequently, these monies are not available for general or other purposes of the State of Michigan, nor are they subject to appropriation by the Legislature.[3]

Michigan did not appeal this judgment. Accordingly, the cases cited by the State for the proposition that consent judgments are nonbinding since they are nonadjudicated dispositions are themselves inapposite.

Similarly, while the State acknowledges that the Michigan Court of Appeals held that the Accident Fund was a Trust, whose assets the State could not use for its own purposes,[4] it implies that *Insurance Commissioner* was no longer good law in 1994, arguing that it was dependent on the "neither more nor less than self-supporting" language of Section 711,[5] which was subsequently repealed by 1990 P.A. 157 ("Act 157"). The State is wrong.

While the Court of Appeals in *Insurance Commissioner* cited the language of Section 711 as part of its rationale, the heart of its reasoning lie in the fact that the State had no liability for the Accident Fund's operation and, therefore, could not profit from its activities:

> We interpret this provision to mean that just as the State does not subsidize the Accident Fund, neither can it receive any "profits" from the fund to expend for other purposes . . . [6]

Although the self-sustaining status of the Accident Fund and the prohibition against a state subsidy may be inferred from the self-sustaining obligation of Section 711, they were

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[3] 545 F. Supp. at 1037.

[4] 173 Mich. App. at 588.

[5] Mich. Comp. Laws §418.711.

[6] 177 Mich. App. at 588.

expressly mandated by Section 701(1),[7] which was not repealed by Act 157. In fact, Act 157 strengthened this feature of the Fund by requiring that the Accident Fund's insurance policies express, on the first page, in 10 point type, that the State of Michigan is not liable for the Accident Fund if the Fund is declared insolvent.[8]

The Accident Fund's obligation to stand alone, independent of the State's financial resources, was further fortified by Act 157, which required the Fund to pay fees to local units of government and to the State equivalent to the property taxes or state income, sales, and single business taxes, it would have paid if completely private.[9]

It defies logic to argue that Act 157, which made the Accident Fund more like a private carrier, was intended to emasculate *Insurance Commissioner*, dissolve the Fund's previously existing "Trust" character, or to silently declare, for the first time, that the Accident Fund's assets are State property.

## REASONS FOR GRANTING THE PETITION

### A. Michigan's Unconstitutional Conversion is Novel and Should be Firmly Rejected by this Court

Failing to find a single United States Supreme Court opinion that expressly prohibits takings by indirection, Michigan argues that this Court has indirectly prohibited indirect taking through inverse condemnation case law. This oblique argument misses the point.

The essence of inverse condemnation is excessive government regulation that effectively denies the property owner of property benefits. Even if inverse condemnation can be considered a species of indirect taking, Michigan's actions here are not analogous to an inverse condemnation. Michigan is not acting here in a regulatory capacity, nor is it merely

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[7] Mich. Comp. Laws §418.701(1).

[8] 1990 Mich. Pub. Acts 157, §1.

[9] Mich. Comp. Laws §418.713.

encroaching on the Policyholder's exclusive rights to the Accident Fund Revolving Fund.

Instead, Michigan is boldly confiscating privately dedicated funds for general public operating purposes through legislative fiat. The intention of the State is clear and direct. The means are indirect and novel for a public entity: Michigan is statutorily committing an "old-fashioned" conversion.

Michigan's defense is limited to why the Policyholders should not receive the $291 million sale proceeds. Michigan's complete failure to justify its own entitlement to the sale proceeds of assets developed without its money, without its risk and after deducting fees and costs for every State service provided is revealing. The very fact that Michigan Legislature had to pass a statute declaring that it owns the proceeds is a clear admission that before the sale it did not own the Accident Fund's assets. Under Michigan law, the Legislature is presumed never to pass useless legislation, and when it amends a statute, it is presumed to intend a change.[10] What this means is that if the State owned the Accident Fund's assets, it would not have had to pass a statute saying that it owned the proceeds from their sale.

Equally telling is that Michigan does not contest that prior to the sale, it could not have directly taken the $150 million cash surplus in the Accident Fund Revolving Fund at the sale closure. In this same vein, Michigan does not deny that the Policyholders were the exclusive beneficiaries of this surplus and were the only parties capable of receiving a distribution of this money through dividend or policy refunds under Section 746(1)(h) and (i).[11] These tacit admissions are tantamount to a concession that the Policyholders have a contractual based property right in at least this portion of the disputed amount.

The State of Michigan forgets what even its Supreme Court superficially recognized, namely, that in situations where a contract is enabled by a statute, a contractual property right

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[10] *English v. Saginaw County Treasurer*, 81 Mich. App. 626 (1978).

[11] Mich. Comp. Laws §418.746(1)(h) & (i).